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A Damages Remedy for Abuses by Child Protection Workers

Child protection workers frequently violate the rights of both parents and child when they remove a child from his or her home. Violations of statutory or constitutional requirements sometimes surface in judicial proceedings months or even years after a change in custody. At that time it may no longer be in the child's best interests to be returned to his or her original parents. Courts, however, lack any effective remedy for the violation of parental rights other than restoring the child to the parents. As a result, courts frequently must choose between rectifying the wrong done to the parents and serving the best interests of the child. Too often, the child is used as damages by courts justifiably outraged by the actions of child protection workers.

States should enact legislation permitting parents and children who have been separated through defective proceedings to recover money damages from the state and its subdivisions. The claim for damages and the question of appropriate custody should be decided in separate judicial proceedings. Distinct treatment of these two issues will provide the parents some relief for the violation of their rights and also serve the best interests of the child.

I. The States’ Child Protection Systems

State child protection statutes authorize child protection workers to remove a child from his or her home under a variety of circumstances. In removing the child from the home, workers sometimes violate the statutory and constitutional rights of parents and children. When a significant period of time intervenes between custody

1. Child protection workers, guided by vague statutory standards as to what constitutes abuse or neglect, see note 32 infra, often remove children unnecessarily from their homes. See note 39 infra. These substantively wrong decisions are often tainted with class and race prejudice, see note 38 infra, and deny parents and children their right to family integrity, see note 6 infra, without due process, see, e.g., In re Daniel C., 47 A.D.2d 160, 365 N.Y.S.2d 535 (1975) (city child care agency illegally retained custody of two children for 27 months); In re Suzanne Y., 92 Misc. 2d 652, 401 N.Y.S.2d 383 (Fam. Ct. 1977) (parental rights terminated without proper notice).


3. See pp. 690-96 infra (discussing inadequacies of current remedies).

termination and judicial recognition that rights have been violated, courts face a difficult dilemma in fashioning a remedy that serves the interests of both the parents and the child.

A. Child Protection Laws and Procedures

Parents have a constitutionally protected liberty interest in the care and custody of their minor children. In addition, courts have recently recognized a fundamental right to family integrity that includes the reciprocal rights of parents and children to be free of unjustified state interference in the family unit. These rights, however, are qualified by the state’s interest as parens patriae in protecting children who are neglected or abused by their parents or guardians. In order to accommodate these conflicting rights and interests, every state has established procedures for determining when and under what conditions a child may be removed from the custody of his or her parents.

5. Stanley v. Illinois, 405 U.S. 645, 651 (1972); cf. Wisconsin v. Yoder, 406 U.S. 205, 222 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”)


7. Parens patriae, literally “parent of the country,” was explained by the English Chancery Court in the following manner: “Every loyal subject is taken to be within the King’s protection, for which reason it is, that idiots and lunatics, who are uncapable to take care of themselves, are provided for by the King as pater patriae, and there is the same reason to extend this care to infants.” Eyre v. Shaftsbury, 24 Eng. Rep. 659, 664 (Ch. 1722). For the history of the parens patriae doctrine from sixteenth-century England to the American present, see Areen, Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases, 63 GEO. L.J. 887, 894-917 (1975); Developments—the Family, supra note 6, at 1221-27.


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Typically, the process of removing a child from his or her home begins with a complaint to a state or local office charged with investigating child neglect and abuse. The complaint may be made by neighbors, health workers, family members, or social workers. Once a complaint has been made, an investigation of the family situation is usually conducted. If appropriate, the child protection worker may recommend intervention that ranges from counseling to removing the child from the home. If the parents refuse to comply with the child protection worker’s recommendations, the state may petition a court to declare that the child is neglected or abused.


12. See Levine, Caveat Pares: A Demystification of the Child Protection System, 35 U. PITT. L. REV. 1, 11 (1975) (child protection investigations are typically very informal and unstructured). Many complaints made to child protection agencies do not ultimately lead to the removal of the child from the home. See id. at 9 (“Many reports of suspected deprivation prove to be unfounded.”) (footnote omitted). As explained by Sanford Katz, the decision to report instances of neglect to an agency may relate more to economic, ethnic, or personal factors than to legally recognized standards. Indeed, the reports may be used by a separated spouse to continue and compound marital difficulties, by a neighbor trying to get a fellow neighbor jailed or evicted from a housing project, or among relatives and neighbors to generally resolve personal antagonisms.


14. Parents are often under considerable pressure to comply with the child protection worker’s suggestions. See Levine, supra note 12, at 11 (parent may misconceive power or role of investigator, believing, for example, that continued welfare benefits are contingent on compliance with worker’s suggestions).

15. See Mnookin, Child Custody Adjudications: Judicial Functions in the Face of Indeterminacy, LAW & CONTEMP. PROB., Summer 1975, at 226, 240 (family or juvenile court usually has jurisdiction in neglect proceedings).

16. Abuse and neglect are variously defined and are difficult to distinguish. One commentator has offered the following definitions:

Abuse generally covers physical and emotional injury. Physical injury includes both beatings and sexual misuse; it denotes the commission of an act or acts damaging to a child’s well-being.

Neglect is generally an omission: a failure to provide for a child’s physical or emotional needs or both. Neglect occurs if parents fail to adequately feed or clothe their children in their own homes. ...
Upon such a finding, often termed an adjudication of dependency, the court may order that the parents follow the child protection worker's recommendations, or that the child be removed from the home.

The child protection worker has a great deal of discretion to decide if and when a child should be removed from the home. The worker decides when it is appropriate to petition a court to award custody of the child to the state. In many states, a worker may remove a child from the home without prior judicial approval if he or she determines that an emergency situation exists. Once the child has been committed to the custody of the child protection agency, the worker has broad discretion to determine when the child should be returned to the home.

Finally, a child protection worker...
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may initiate proceedings\(^2\) to eliminate the few rights parents retain over a child in agency custody.\(^3\)

B. *Violations of Rights and Judicial Dilemmas*

The child protection system has frequently been criticized for failing to improve the lives of the children who pass through it\(^2\)\(^5\) and for violating the rights of families to be free of unjustified state intervention.\(^2\) Child protection workers commonly intervene in families on the basis of scanty, unreliable evidence,\(^2\)\(^7\) cite conduct that does not endanger the child as a reason for intervention,\(^2\)\(^9\) apply improper pressures on parents they are investigating,\(^2\)\(^3\) and fail to

2. See Wald, *supra* note 10, at 633 (proceedings to terminate parental rights authorized by statute in all states). Courts may order termination based on an adjudication of neglect, *id.* at 633-34 (12 states allow termination as disposition in neglect cases), or a finding that a parent has failed to maintain contact with his or her child in foster care, *see, e.g., N.J. STAT. ANN. § 30:4C-15 (West 1964)* (termination allowed if parents fail to maintain contact for one year); N.Y. FAM. CT. ACT § 614(d) (McKinney Supp. 1980) (same). About half the states require that parental rights be terminated at a special proceeding prior to an adoption proceeding. *See, e.g., ARIZ. REV. STAT. ANN. § 8-533 (Supp. 1980)*; N.J. STAT. ANN. § 30:4C-15 (West 1964).

24. These include the right to inherit from the child and the right to withhold consent to his or her marriage or military enlistment, *see* Wald, *supra* note 10, at 632, and the right to petition the court for a restoration of custody, *see* Note, *supra* note 8, at 230.

25. Critics argue that children are commonly removed from their families when the state cannot provide them with a better environment, and that, in fact, removing a child from his or her parents often results in additional harm to the child. *See* Wald, *supra* note 10, at 644-45 (child care experts consider foster care often worse alternative than leaving child in home). Once a child is placed in foster care, it is likely that his or her parental relationship will deteriorate significantly. *See* Levine, *supra* note 12, at 20-21 (agencies discourage parents from maintaining contact with children in foster care). Moreover, multiple foster home placements do not provide a child any security or the chance to develop new attachments. *See* Wald, *supra* note 10, at 639 (majority of children in placement remain in foster care for lengthy period without ties to parents and without permanent home).

26. *See, e.g., In re Suzanne Y., 92 Misc. 2d 652, 663, 401 N.Y.S.2d 383, 390 (Fam. Ct. 1977)* (Garnstein, J.) ("[W]here we permit government-sanctioned agencies to make day to day judgments on which families shall remain together or be torn apart according to the value judgments of its concededly well intentioned workers, we approach... tyranny... "); Levine, *supra* note 12, at 8-13 (child protection workers intrude without justification into families that cannot effectively resist); Note, *supra* note 8, at 223 (current child welfare system fails to protect adequately family unit).

27. *See* Levine, *supra* note 12, at 9-10 (investigation is often undertaken on basis of anonymous phone calls).

28. *See, e.g., Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976)* (white mother and son lived with black man in black neighborhood); *In re Raya, 255 Cal. App. 2d 260, 63 Cal. Rptr. 292 (1967)* (parents not legally married); *In re Yardley, 260 Iowa 259, 149 N.W.2d 162 (1967)* (mother frequented taverns); *cf. Developments—the Family, supra* note 6, at 1317-18 (although most statutes allow finding of neglect based on parents' traits, determinations of neglect should be based on child's condition rather than on parental behavior).

29. *See, e.g., Levine, supra* note 12, at 12 (child protection workers use "aggressive casework," that is, employ threats against parents to achieve their objectives); Wald,
offer families social services as an alternative to removing the child from the home. In addition, parents and children are often separated without being accorded constitutional due process or the benefit of specific procedural protections created by state statutes.

These abuses are attributable to a number of different factors. Child protection workers are guided by vague statutory standards. Moreover, state and local child protection agencies are inadequately funded and their staffs are usually overworked, undertrained, and inexperienced. The most difficult and important decisions are often made by the least experienced field workers. A third factor is that the majority of child protection cases involve poor or nonwhite people who differ in class, race, culture, and often language from

*State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards,* 27 Stan. L. Rev. 985, 1006 (1975) (agencies pressure families to accept "voluntary" services even though children are not suffering from harm cognizable under applicable statutes).

30. See Note, *supra* note 8, at 229 ("little firm commitment [by government] to providing social services designed to reunify the family"); cf. Areen, *supra* note 7, at 917 (courts should use family therapy programs to treat neglectful parents rather than simply remove child).


32. See, e.g., COLO. REV. STAT. § 19-1-103(20) (1978) (grounds for state intervention include parental "mistreatment or abuse," environment injurious to child's welfare, and lack of proper parental care); MASS. ANN. LAWS ch. 119, § 24 (Michie/Law. Co-op Supp. 1980) (petition to commit child to state custody may be based on grounds that child is "without necessary and proper physical, educational or moral care and discipline, or is growing up under conditions or circumstances damaging to a child's sound character development, or ... [is] lack[ing] proper attention of parent"); Wald, *supra* note 29, at 1000 ("Most state statutes define neglect in broad, vague, language which would seem to allow virtually unlimited intervention.") But cf. S. Katz, *supra* note 10, at 64-65 (vague laws can be justified as necessary to enable judges to examine each situation on its own facts).

33. See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, CHILD WELFARE IN 25 STATES—AN OVERVIEW at 11.56 (1976) (Pub. No. (OHD) 76-30090) (of 21 states that expressed opinion in recent survey, 14 reported that financing of child welfare services was generally inadequate; in two other states, funding was reported to be generally adequate only for priority services).

34. See Campbell, The Neglected Child: His and His Family's Treatment under Massachusetts Law and Their Rights Under the Due Process Clause, 4 SUFFOLK U.L. REV. 631, 642 (1970) (study of Massachusetts Division of Child Guidance revealed that few workers were over 26 years of age, and that most workers had only B.A. degrees, usually in field other than psychology or social work); Note, *supra* note 8, at 239 (social workers lack time to provide effective assistance to clients because of burdensome caseload).

35. See Campbell, *supra* note 34, at 644 (judgments of very inexperienced workers often determine child's fate).

36. A study of neglect cases in Minneapolis and St. Paul, Minnesota, showed that the educated, economically independent family is the rare exception among the neglect referrals. The preponderance of the families referred for neglect come from the lower socioeconomic strata of the community and differ markedly from the general population in education, income, neighborhood, race and family structure. . . .

In the general population, only 3% of families are dependent upon general re-
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the child protection worker who is investigating them.\textsuperscript{37} These cultural differences allow ethnocentric biases concerning "good" child-rearing practices to warp the child protection worker's perception of the child's home situation.\textsuperscript{38}

The broad discretion accorded child protection workers is commonly cited as the most important reason for substantively incorrect custody decisions.\textsuperscript{39} Many commentators have argued that the procedural safeguards that protect family integrity should be strengthened.\textsuperscript{40}

\textsuperscript{37} See Levine, supra note 12, at 14 (child protection workers are young, predominately white, and "resoundingly middle class"); Wald, supra note 29, at 998 (percentage of minority workers in agencies is very low, although minorities are significant proportion of clients in urban areas).

\textsuperscript{38} See Areen, supra note 7, at 888-89 (poverty of parents charged with neglect "raises the troubling possibility that class or cultural bias plays a significant role in decisions to label children neglected or abused"); Levine, supra note 12, at 16 ("It should be evident that the sociocultural dissonance and inexpertise of the typical caseworker would result in poor rapport with the parent even if their interests coincided."); Wald, supra note 29, at 998 ("Social work agencies apply middle-class standards to poor and minority parents and attempt to change their lifestyles to meet middle-class norms.").

\textsuperscript{39} See, e.g., Levine, supra note 12, at 8 ("Unmonitored discretion ... cloaked with veil of benevolence invites arbitrary decisionmaking."); Wald, supra note 29, at 1001-02 (decisions by child protection workers "often reflect personal values about childrearing, which are not supported by scientific evidence, and which result in removing children from environments in which they are doing adequately") (footnote omitted).

\textsuperscript{40} See Campbell, supra note 34, at 667-69 (notice accorded parents who are subject to neglect proceeding should be more specific); Levine, supra note 12, at 45-52 (proposing that child welfare investigators be required to obtain search warrant prior to entering home, that parents be accorded right to refuse to discuss inquiry with investigator, that they be warned that anything they say may be used against them, and that parents have right to consult attorney at any stage of investigation as well as right to court review). The Institute of Judicial Administration—American Bar Association Joint Commission on Juvenile Justice Standards recommends several layers of judicial protection to reduce intrusion into the family, including a probable cause hearing on whether complaints should be investigated and a requirement that the worker submit a plan of investigation.
and that the criteria for state intervention in the home should be more specific.\textsuperscript{41} The courts have invalidated several state child protection statutes on due process grounds.\textsuperscript{42} A number of states have recently revised their child protection statutes to provide more specific guidance to child protection workers.\textsuperscript{43}

But improving the rules will not ensure that the rules will be followed.\textsuperscript{44} Child protection workers frequently violate parents' and children's constitutional and statutory rights by applying established procedures improperly. Agencies have retained custody of children for extended periods without seeking the judicial approval required by state statutes.\textsuperscript{45} Agencies also have frequently violated parents' rights to notice and a fair hearing.\textsuperscript{46}

If such procedural violations are discovered long after the child has

to the court before he or she intervenes in the family. Institute of Judicial Administration—American Bar Association, Juvenile Justice Standards Project, Standards Relating to Abuse and Neglect § 5.2 (Tent. Draft 1977). For a critique of these proposals, see Lowry, \textit{The Judge v. The Social Worker: Can Arbitrary Decisionmaking be Tempered by the Courts?} 52 N.Y.U. L. Rev. 1033 (1977).

41. See, e.g., J. Goldstein, A. Freud, & A. Solnit, \textit{Before the Best Interests of the Child} 31-109 (1979) (state should intervene in family only in narrowly defined cases, for instance, when parents request state to place child, when longtime caretakers wish to become child's legal parents, when parents die, when parents are convicted of sexual offense against child, when parents inflict, or allow to be inflicted, serious bodily harm upon child, or when parents refuse to authorize lifesaving medical care) (hereinafter cited as \textit{Before the Best Interests}); Institute of Judicial Administration—American Bar Association, Juvenile Justice Standards Project, supra note 40, § 1.3, at 39-44 (Tent. Draft 1977) (comment) (statutory grounds for coercive intervention on behalf of endangered children should be as specific as possible and should authorize intervention only when child is suffering, or will imminently suffer, serious harm); Wald, supra note 10, at 700-01 (proposing that statutory grounds for intervention be limited to physical injury, serious and untreated emotional damage, incest, serious lack of medical treatment, and delinquent acts that result from parental encouragement).

42. See, e.g., Roe v. Conn, 417 F. Supp. 769, 778-80 (M.D. Ala. 1976) (invalidating Alabama's termination statute for vagueness and for permitting terminations in cases in which child is not subject to "real physical or emotional harm" and in which failure of less drastic measures has not been demonstrated); Alsager v. District Court, 406 F. Supp. 10, 21-25 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976) (invalidating Iowa's parental rights termination statute on grounds that "clear and convincing" evidence of abuse or neglect and notice reciting specific factual basis and legal standards for custody termination are required before parental rights may be terminated).


44. See \textit{Before the Best Interests}, supra note 41, at 18 ("[S]pecificity of statutory language will never be enough to preclude unjustifiable invasions of family privacy. . . . Nor will rules be enough to assure that those who unjustifiably violate family integrity will be held accountable for their abuse of power.")


46. See \textit{In re} Suzanne Y., 92 Misc. 2d 652, 654, 401 N.Y.S.2d 383, 384 (Fam. Ct. 1977) (mother not notified of termination hearing until day after it was held).
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been removed from the home, courts face a difficult dilemma. A child separated from his or her parents faces significant trauma and anxiety. A separation of even a few weeks can be extremely harmful to his or her development. However, a child also completes the grieving and healing process in a much shorter period than an adult. If the child has been placed in a foster family after being taken away from his or her parents, the child is likely to have formed new attachments to the adults in the foster family. Thus, the child may have gone through an intense grieving period and may have begun again to relate in a loving way to those in his or her new environment. Uprooting the child a second time is likely to be very upsetting and may cause permanent psychological harm.


48. See J. DUNN, DISTRESS AND COMFORT 73 (1977) (“When young children have to spend time away from their families . . . nearly all of them show immediate distress. Very often this is followed by a period of apathetic misery, and for some children there is a later stage of apparent ‘detachment’ from their parents.”); cf. Wald, supra note 10, at 645 (children often view foster home placement as punishment, and often experience identity problems, conflicts of loyalty, and anxiety about their future).

49. According to one authority, States of anxiety and depression that occur during adult years, and also psychopathic conditions, can . . . be linked in a systematic way to the states of anxiety, despair, and detachment . . . that are so readily engendered whenever a young child is separated for long from his mother figure, whenever he expects such a separation, and when . . . he loses her altogether.

J. BOWLBY, ATTACHMENT AND LOSS 4-5 (1973). The period of separation that will harm a child depends upon his or her age, among other factors. See J. GOLDBEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 42 (1973) (“[T]he younger the child, the shorter is the interval before leave-taking will be experienced as a permanent loss . . . .”) (hereinafter cited as BEYOND THE BEST INTERESTS); R. PATTON & L. GARDNER, GROWTH FAILURE IN MATERNAL DEPRIVATION 38 (1963) (“The gravest effects of separation are seen between the ages of three months and two years, and then gradually decrease in severity until the age of seven or eight when the child is able to tolerate long periods of separation without any lasting major damage to personality structure.”) (footnote omitted).


Observers seldom appreciate the depth and seriousness of this grief of a small child. Their judgment of it is misled for one main reason. This childish grief is short-lived. Mourning of equal intensity in an adult person would have to run its course throughout a year; the same process in the child between 1 and 2 years will normally be over in 36 to 48 hours. It is a psychological error to conclude from this short duration that the reaction is only a superficial one and can be treated lightly.

Id.

51. Indeed, to cope with the desolation that he or she feels at the loss of the parents, a child may desperately reach out to the new adult caretaker. See BEYOND THE BEST INTERESTS, supra note 49, at 40-41 (“[N]ew adult who cares for the child’s physical needs is latched onto, quickly, as the potential psychological parent.”) (footnote omitted).

52. The caretaking adults who replaced the child’s original parents will eventually become the psychological parents. If the child’s relationship of trust and love is broken for a second time, the child may face severe difficulty in forming new emotional relationships. See BEYOND THE BEST INTERESTS, supra note 49, at 32-33.
As a result, courts currently face a difficult choice. On the one hand, returning the child to the original parents is likely to cause grave psychological injury to the child. On the other hand, parents are entitled to some relief if they have been deprived of fair procedures. At present, the law fails to provide a just alternative to a choice that sacrifices either the child's or the parents' interests.

II. Current Remedies: Description and Critique

An appropriate remedy for improper custody terminations should satisfy several criteria. The remedy should compensate parents and children for the emotional trauma that they have suffered and for the deprivation of their statutory or constitutional rights. It should deter child protection workers from further violations of established procedures. It should also serve as symbolic recognition that the parents and children were wronged. Finally, the remedy for improper government intervention in the parent-child relationship should serve the best interests of the child. Remedies currently available to the courts fail to satisfy these criteria.

A. Returning the Child to the Original Home

Parents whose rights have been violated by child protection workers through improper custody terminations commonly seek their child's return as relief. This may occur in a variety of procedural contexts. For example, parents may seek a writ of habeas corpus in order to regain custody of their child from a state agency. When parents appeal an adjudication of neglect that led to loss of custody, they may argue that their child should be returned because of violations of their rights in the initial proceeding. Procedural errors in the

53. Removal of a child from the parents' custody based on an accusation that the child was abused or neglected stigmatizes the parents and lowers their self-esteem. It is a public statement that they have failed as parents. See Levine, supra note 12, at 21-22. An appropriate remedy should announce that it was the state that failed.

54. This Note adopts the thesis developed in BEYOND THE BEST INTERESTS, supra note 49, at 31, 40, 49, that placement decisions should attempt to achieve the custodial alternative that is least detrimental to the child. Placement decisions should safeguard a child's need for continuity of relationships, take into account a child's sense of time, and recognize the law's incapacity to supervise interpersonal relationships and the inherent limitations of longrun predictions.


56. See, e.g., Juvenile Appeal (Anonymous) v. Commissioner of Children & Youth Servs., CONN. L.J., June 12, 1979, at 1 (Connecticut Supreme Court reversed judg-
initial removal or continued detention of a child may also be raised when the parents resist a state move to terminate their rights over a child held in temporary care. 57

The states differ widely on how the competing interests of parent and child should be weighed in making a custody decision. Most states continue to recognize the presumptive right of natural parents to custody of their child. 58 A minority of states have adopted the view that custody decisions should be based solely on what disposition will serve the best interests of the child. 59 According to the

ment terminating parental rights and severing visiting privileges two years after entry of initial order); In re Sanjivini K., 47 N.Y.2d 374, 391 N.E.2d 1316, 418 N.Y.S.2d 339 (1979) (reversing ruling that terminated parental rights to 13-year-old child who had been with prospective adoptive parents for 10 years).

57. See, e.g., In re Leon RR, 48 N.Y.2d 117, 397 N.E.2d 374, 421 N.Y.S.2d 863 (1979) (reversing order terminating parental rights to nine-year-old child who had been in foster care with prospective adoptive parents for eight years).

58. See Note, Psychological Parents vs. Biological Parents: The Courts' Response to New Directions in Child Custody Dispute Resolution, 17 J. FAM. L. 545, 548-51 (1979) (21 states emphasize natural parents' presumptive right to child custody; 12 states have moved substantially away from parental rights view, but have not fully embraced child-focused view).

59. See id. at 550-51 (eight states have adopted best interests of child standard). Although the family is entitled to constitutional protection, see notes 5-6 supra (citing cases), the courts may award custody to foster parents in order to serve the child's best interests, even when the original parents are fit. A finding that a child's foster parents have become his or her psychological parents vitiates the biological parents' claim to protection for their familial relationship with the child. When the biological family is no longer the psychological family, it is the psychological family that deserves constitutional protection.

The Supreme Court addressed, but did not resolve, the question of whether foster families have a constitutionally protected liberty interest in their survival as families in Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 842-47 (1977). The Court stated that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association." Id. at 844. This suggests that the Court would approve of a custody award to psychological parents when it would not be in the child's best interests to be returned to his or her biological parents.

Some commentators, however, have incorrectly interpreted Quilloin v. Walcott, 434 U.S. 246 (1978), to indicate that the Court would be reluctant to approve terminations of parental rights without a finding of parental unfitness. See Crouch, International Convention Efforts and the Current Status of Children's Rights in the U.S.A., 6 FAM. L. REP. (BNA) 4023 (1980) (Supreme Court has expressly rejected use of best interests standard to justify terminating rights of fit parents). The Court said in Quilloin:

"[T]he Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interests.""

434 U.S. at 255 (quoting Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)). Although the Court in Quilloin clearly stated that functioning family units are constitutionally protected, this language should not be construed to mandate a conclusive preference in favor of biological parents over psychological parents. Indeed, Quilloin's holding negates such a conclusion. The Court rejected the contention that an unwed father, absent a finding of unfitness, was entitled as a matter of due process and equal protection to an absolute veto over adoption
latter view, courts should not use custody decisions to redress wrongs done to the parents or to punish wrongs committed by them.\textsuperscript{50} Regardless of the consideration accorded parents' interests in state law, it is difficult for a court to decide that parents who undeservedly have had their child wrested from them should not regain custody.\textsuperscript{61} This decision is particularly troublesome because there is no effective alternative remedy. If he or she does not return the child, the judge has nothing to give the parents as justice.

The judge will try not to view his or her decision as a choice between two evils. In order to reduce the mental discomfort that such a dilemma causes,\textsuperscript{62} the judge may misperceive or ignore facts. Despite contrary evidence, he or she may deny that the violations of the parents' rights led to the initial custody shift and refuse to award custody to the parents.\textsuperscript{63} Alternatively, he or she may ignore

of his natural child. In reaching this result the Court emphasized that the father had no psychological or financial relationship with the child at any time. The reference to Justice Stewart's remarks in \textit{Smith} was therefore mere dictum. Arbitrary state intrusion into an intact natural family that serves the needs of both parents and children should be unconstitutional. But this does not prohibit a state from serving the best interests of the child if, for whatever reason, these mutually beneficial relationships cease to exist.

Constitutional due process does require, however, that the best interests standard be clearly defined and narrowly construed when applied to terminate a parent's rights to his or her child. \textit{See Chemerinsky, Defining the "Best Interests": Constitutional Protections in Involuntary Adoptions, 18 J. Fam. L. 79, 109-12 (1979) (adoptions without consent of natural parents should be ordered only if there is significant likelihood that natural parents will abuse or neglect child in future, or if child has stable psychological parent-child relationship with adult who wishes to adopt, and when less drastic alternative would not work).}

\textsuperscript{60} The objection to this remedy-dispensing role for a court trying a custody case is that the child is treated as damages. \textit{Cf. Beyond the Best Interests, supra note 49, at 105-11 (when rights of parents and children conflict, children's rights are more deserving of court's protection).}

\textsuperscript{61} \textit{See In re Suzanne Y., 92 Misc. 2d 652, 662, 401 N.Y.S.2d 383, 390 (Fam. Ct. 1977) ("Where should the outrage generated by these circumstances be directed?")}

\textsuperscript{62} Leon Festinger has termed this mental discomfort cognitive dissonance. He defines it as "an antecedent condition which leads to activity oriented toward dissonance reduction just as hunger leads to activity oriented toward hunger reduction." \textit{L. Festinger, A Theory of Cognitive Dissonance 3 (1957). Dissonance, or inconsistency, is psychologically uncomfortable and motivates a person to try to reduce the dissonance and achieve consonance. Id. Fact-finding errors by judges in child custody cases have also been described in psychoanalytic terms. \textit{See Burt, Forcing Protection on Children and Their Parents: The Impact of Wyman v. James, 69 Mich. L. Rev. 1259, 1280 (1971) ("[C]ountertransference can . . . be disabling for sensible judicial response to child abuse and neglect cases.")}}

\textsuperscript{63} A recent case before the New Jersey Supreme Court, Sorentino v. Family & Children's Soc'y, 72 N.J. 127, 367 A.2d 1168 (1976), illustrates this type of judicial self-deception. Sorentino, a teenaged mother, voluntarily surrendered her newborn child to defendant adoption agency with the understanding that she could recover her child within thirty days. However, when the mother requested the child's return, the agency refused. An agency supervisor then coerced her into signing a surrender agreement.

After some delay, caused largely by incorrect legal advice, Sorentino brought an action
or misperceive the child’s best interests and grant the parents’ request for custody.\textsuperscript{64}

Returning the child to his or her parents is an inappropriate remedy for violations of parents’ and children’s rights. It has some symbolic value insofar as it provides official recognition that the parents were treated improperly in the initial custody decision. In addition, an award of custody provides parents the primary relief they seek. But custody does not compensate the parents for the mental anguish suffered during the separation or for the procedural violation. Moreover, a restoration of parental custody lacks any deterrent effect.

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...
storing the child to his or her parents imposes no sanction on the child protection agency and therefore creates no incentive for the agency to prevent future procedural violations.

Most importantly, returning the child to his or her original parents may not be in the child's best interests. If the child has begun to relate to other caretakers as his or her psychological parents, shifting custody a second time may result in serious and long-lasting harm to the child. In sum, an award of custody fails to satisfy sufficiently the criteria for an effective remedy for improper custody termination.

B. Actions for Damages

Parents and children who have been wrongfully separated cannot recover meaningful damage awards under federal law from individual child protection workers or their government employers. There are also significant barriers to using state law to recover damages for procedurally flawed custody decisions.

1. Federal Law

Under federal law, states cannot be held liable for unconstitutional interferences with the parent-child relationship by child protection workers. The Eleventh Amendment bars any action against a state in federal court. Although municipalities and counties may be held liable for violations of constitutional rights under 42 U.S.C. § 1983, although this decision may be in the best interests of the child, it totally fails as compensation, deterrence, or symbolic vindication.

65. See note 52 supra (repeated separations cause increasingly more severe psychological damage to child).

66. A fortiori, refusing the parents' request for custody is also an inadequate remedy. Although this decision may be in the best interests of the child, it totally fails as compensation, deterrence, or symbolic vindication.

67. U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.")


69. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


In Monell v. Department of Social Servs., 436 U.S. 658 (1978), the Court held that
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the challenged action must represent an official government policy or custom.70 The Supreme Court has explicitly stated that a local government cannot be held liable under section 1983 on a theory of respondeat superior.71 Unsanctioned wrongdoing by a child protection worker will therefore not subject a local government employer to liability.

Individual child protection workers are liable to suit under section 1983 for violations of parents’ and children’s constitutional rights.72 Individual workers, however, commonly are judgment proof.73 Although the heads of child protection agencies are more likely to possess sufficient assets to make a significant recovery possible, they are unlikely to be held liable for the activities of their subordinates.74

2. State Law

At present, state law as well does not provide an adequate remedy.75 As in the case of section 1983 actions against individual employees, it is difficult to collect significant damage awards from individual child protection workers. Some states and municipalities are protected from liability under state law by the doctrine of sovereign immunity for governmental acts.76 Even in states that have ab-

municipalities are “persons” for the purposes of section 1983. In Owen v. City of Independence, 445 U.S. 622 (1980), the Court extended its ruling in Monell by holding that municipalities are not entitled to good faith immunity.


71. Id. at 691-92.


73. See R. SPURRIER, To Preserve These Rights 26-27 (1977) (doubtful that large damage awards can be collected from low-paid state employees); Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922, 923 (1976) (many officials lack financial means to pay substantial judgments).


75. There is a common-law action against one who, by force or seduction, deprives parents of their child’s custody. See Restatement (Second) of Torts § 700 (1976 & Supp. 1978). However, the remedy is seldom invoked. But see, e.g., Oversmith v. Lake, 295 Mich. 627, 295 N.W. 339 (1940) (affirming award of $150 in damages against county welfare officer and matron of juvenile detention home for seizing plaintiff’s six children and retaining custody for 45 days).

76. Those functions and activities that can be performed only by government are termed “governmental” in character, see W. Prosser, The Law of Torts § 131, at 980
rogated or limited this common-law immunity, governmental units may not be liable for their agents' intentional torts.\textsuperscript{77}

Actions for money damages do not adequately compensate parents and children who have been wrongfully separated. Even if state or federal law permits recovery of money damages, the amount awarded is likely to be paltry. Because child protection agencies and their administrators are generally protected from liability, no systemic deterrence is achieved. In addition, the parents are accorded no symbolic recognition that their rights have been violated. Finally, because current causes of action do not provide an adequate remedy for the parents' injuries, courts are likely to use the child as damages even if restoring the child to the parents will be harmful to the child.\textsuperscript{78}

III. A Statutory Money Damages Remedy

Parents who have been wrongfully separated from their children are entitled to some relief. An effective damages remedy would permit courts to recognize and rectify, at least to some degree, the injury suffered by the parents. At the same time, such a remedy would permit courts in custody proceedings to focus exclusively on the best interests of the child.

A. Proposed Legislation

To overcome the limitations of existing remedies for procedurally defective custody terminations, states should enact legislation permitting parents\textsuperscript{79} who have been wrongfully separated from their chil-

\textsuperscript{77} Id. § 70, at 464 (master liable for intentional tort of servant only if its purpose is to further master's business).

\textsuperscript{78} The argument that available damage remedies are inadequate can be applied to various constitutional and statutory violations other than procedurally flawed custody terminations. See R. Sparber, supra note 73, at 131 (remedies for constitutional torts generally inadequate). But in no other context is a damages remedy necessary to ensure that a judge does not use another human being as damages to compensate the victim of a rights violation.

\textsuperscript{79} Both parents and children suffer when they are separated through defective procedures. Children are deprived of their constitutional right to family integrity, see note 6 supra, and they may suffer serious and long-lasting psychological harm, see notes 48-52 supra. In theory, therefore, the option of suing for damages for improper custody termination should be available to children as well as to parents. As a matter of practice, however, parents are the most likely plaintiffs in such a suit. For that reason, this Note emphasizes the case of a suit brought by the parents.
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dren by child protection workers to recover damages from the state or local government. Damages should be recoverable on a theory of strict liability when child protection workers fail to comply with statutorily mandated procedures or with state or federal guarantees of due process. Parents should be permitted to take advantage of this remedy whether or not the procedural violation resulted in a custody shift that was substantively incorrect. Although parents generally prefer custody of their child to money, our legal system commonly uses money as a substitute for irreplaceables.

The claim for damages should be heard separately from and subsequent to any custody proceeding. In the custody proceeding the court should focus exclusively on the question of what will serve the best interests of the child. In the damages action the court should focus on whether the parents were deprived of procedural rights granted by a state statute or secured by the federal or state constitution, and award them some measure of relief if their rights were violated. Distinct treatment of these two issues will promote honesty and accuracy in factfinding by reducing judges' incentive to strain to make the best interests of the child fit the rights of the original parents.

The government employer rather than the individual child protection worker should be subject to liability. Holding the employer liable would properly focus the deterrent effect on the administrative structure. In order to protect itself from liability, the state would improve its selection, training, and supervision of child protection workers. The state would have the incentive to confine the individual worker's discretion through detailed standards of conduct. Moreover, making the state employer instead of the individual em-

80. Under the proposed remedy, the states could not avoid liability by showing due care in administering a child protection system.

81. However, damages would not be available as compensation for a substantively wrong custody loss that was procedurally correct. See p. 700 infra (goal of proposal is to prevent substantively incorrect custody decisions by encouraging compliance with procedural rules).

82. For example, money is used as compensation for lost limbs and lost lives. See W. Prosser, supra note 76, § 127 (every state now has a wrongful death statute).

83. The disposition in the custody action may well be relevant to assessing a measure of damages. See notes 84, 89 infra. However, the resolution of the damage action should have no bearing on the child's custody. See note 54 supra (custody hearing should be governed by best-interests-of-child standard).

84. In assessing damages for procedural violations by child protection workers, the major focus should be on compensating the victims. Damages in any particular case should depend on such factors as the seriousness of the procedural violation and the degree of actual injury suffered. For example, if the child has been irretrievably lost, courts may award a higher damage figure than if parent and child were only temporarily separated.
ployee liable would give parents greater assurance that damage judgments will be satisfied. 85

The proposed damages action would meet all the criteria for an adequate remedy. It would compensate parents for the loss of their child; it would deter, on a system-wide basis, further violations of parents' and children's rights; and it would provide a symbolic statement that the state has violated the parents' right to fair procedures. Most importantly, a separate damages remedy would promote the best interests of the child because it would provide a remedy that is an effective alternative to restoring custody to the parents. 86

85. In addition, it would increase the likelihood of a significant damages award. Cf. Note, supra note 73, at 923 (judges and juries may be unwilling to assess large damages against individual worker).

86. A possible objection to this proposal is that the interests of parents, children, and the state could be protected more effectively simply by providing for expedited judicial review of flawed custody decisions. Appellate review of defective custody decisions could ideally be carried out in a few days, and the child returned immediately to the parents. The child therefore would not form any attachments to new caretakers and it would likely be in the best interests of the child to return him or her to the parents.

Expedited appellate review is currently available in many states. See, e.g., Mass. Ann. Laws ch. 119, § 27 (Michie/Law. Co-op Supp. 1980) (appeals session may advance time for de novo review of adjudication of neglect). Speedy appellate review cuts down on the number of cases in which procedurally defective custody decisions lead to eventually permanent separations. However, even where expedited appellate review is generally available, a statutory money damages remedy would still serve important functions.

First, restoration of the child to his or her parents following expedited appellate review still undercompensates the parents because it merely restores the status quo, and does not provide a remedy for the due process violation or for the period of separation, however short. Moreover, it has little deterrent value. Although the child protection worker's actions are scrutinized by a court, and subject to criticism if found to be incorrect, such judicial proceedings are typically closed and the shame of public censure is lacking. Moreover, appellate determinations do not have a systemic deterrent effect; they do not place significant pressure on policymakers to improve the training and supervision of child protection workers. This systemic deterrent is crucial given that the turnover in individual workers is so high. See Campbell, supra note 34, at 643.

Extremely swift appellate review resulting in return of the child might have some value as a symbolic affirmation that the parents were wronged by the state. However, there are many cases in which the state takes children from their homes for a short time, and for good cause, and returns them when the parents have agreed to correct deficiencies in their homes. Judged against this background of practice, the quick return of the child is of dubious value in obliterating the stigma that the initial removal created.

Also, the congestion of court calendars is not the major cause of delays between procedural violations and appellate review. Parents accused of neglect are almost invariably poor and legally unsophisticated; they frequently view acquiescence as their only course. Many children are placed in foster homes on a "temporary" basis for a long period of time; until a permanent termination of parental rights is sought, the parents may be reluctant to appeal. In cases involving the worst kinds of due process violations, the parents are not given an initial adjudication from which to appeal.

Finally, the availability of expedited judicial review does not eliminate those cases in which the removal of the child from the home, though procedurally flawed, is substantively correct. In those cases, the existence of the money damages remedy is crucial not only to compensate the parents, but also to deter future violations of parents' and children's rights.
B. Anticipated Criticisms and Responses

A number of potential objections may be raised to this proposal and to the details of its implementation. None of these objections, however, has sufficient merit to justify rejecting the proposal.

1. Unjust Compensation

One potential objection to the proposed statutory remedy is that it would permit unjust enrichment of parents who either did not care about losing their children or who deserved to lose them. For example, parents who abused their child but whose custody was terminated through improper procedures would be able to recover damages under this proposal. To avoid this result, recovery could be limited to parents who could show both that their procedural rights were violated and that the procedural error led to a custody determination that was substantively wrong.

Damages, however, should be awarded even if there has been only a procedural violation. Although some parents would receive compensation to which they have no moral claim, damages awarded to such parents would deter future procedural violations. Overcompensation is a price society should be willing to pay to increase the likelihood that valid procedures will be followed. Moreover, the problem of overcompensation could be mitigated to some extent by increasing or lowering the damages award depending on whether or not the procedural violation led to a substantive error.

2. Waste of Judicial Resources

It may also be argued that two separate proceedings, one to decide custody issues and another to assess damages, would be an unnecessary waste of judicial resources. The proceedings will often focus

87. In Carey v. Piphus, 435 U.S. 247 (1978), the Supreme Court held that only nominal damages can be recovered in section 1983 cases when there are no actual injuries, and that damages should not be presumed to flow from a procedural due process violation. Failure to remedy constitutional torts undercompensates victims of official abuses, and is counter to section 1983's deterrent role. See Note, Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Piphus, 93 Harv. L. Rev. 966, 980-85 (1980). Accordingly, the deprivation of a due process right is an injury that should be compensated.

88. If child protection agencies were not held liable when parents are ultimately found to have been neglectful or abusive, agencies would have less incentive to ensure that proper procedures were always followed. There might be a tendency to gamble on cases in which the parents were likely to be judged neglectful.

89. Thus, if a procedural violation led to permanent loss of custody, a parent would receive a higher damage award than if the procedural violation did not result in the loss of custody, either because the child was restored to the parents, or because the parents would have lost the child in any event.
on the same facts and involve the same litigants. For example, in the custody hearing, the circumstances surrounding the child's removal from the home would be relevant to the issue of where the child will be placed. In the damages hearing, the resolution of the custody issue would be relevant in fixing the amount of damages.

Nevertheless, the proceedings should be kept distinct; the custody proceeding is not the appropriate forum in which to remedy violations of parental rights. A court that hears evidence concerning the unjust nature of the original termination could be reluctant to find that the child's best interests will not be served by restoring custody. Similarly, if the procedurally defective custody termination was substantively correct, a judge could find it difficult to award meaningful damages to the original parents. Thus, it is likely that the custody and damages proceedings would infect each other if they were combined. A formal separation of issues would help to ensure that children are not used as damages and that parents are compensated fully for violations of their rights.

3. Adverse Effects on Children

The most serious potential objection to the proposal is that the threat of liability could deter child protection workers from acting forcefully to help children, and that as a result children would be harmed by negligent or abusive parents. This proposal, however, should not have such a deterrent effect. In the first place, it does not impose personal liability on the individual child protection worker. Secondly, the proposal provides a cause of action for procedural violations, not for decisions that are substantively incorrect. A child protection worker who removed a child from his or her home would not subject the agency to liability if the decision to intervene in the family were later determined to have been incorrect. Damages could be recovered only if procedural rights, such as timely notice and opportunity for a hearing, were not accorded the parents. The goal of this proposal is to prevent substantively incorrect custody decisions by encouraging compliance with procedural standards.

Conclusion

More stringent procedural safeguards should be established to prevent mistakes and abuses in child custody decisions. Regardless of

90. Cf. pp. 692-93 supra (judges in neglect cases may misperceive evidence in order to reduce cognitive dissonance).
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the formal standards that are adopted, however, parents and children will continue to be separated through proceedings that are tainted with race and class prejudice, based on erroneous evidence, or motivated by malice.

Custody of the child should not be used as damages to remedy these wrongs. Instead, parents should be able to recover money damages when child protection workers fail to adhere to procedural standards mandated by state statutes or compelled by constitutional guarantees of due process. State legislatures should therefore enact a statutory cause of action for parents whose children are improperly removed from their custody by state agents.